

ON OCTOBER 6, 2010, ARBITRATOR BYRON YAFFE ruled in favor of MAP's grievance where the City of Lockport denied our grievant's request to work scheduled overtime on the basis of his seniority. Nice award attached.

IN THE MATTER OF AN ARBITRATION BETWEEN

CITY OF LOCKPORT

And

RE: Vitacco Grievance
FMCS 10-55428

METROPOLITAN ALLIANCE OF POLICE
LOCKPORT CHAPTER #75

APPEARANCES:

Marji Swanson on behalf of the Employer
Joseph Mazzone on behalf of the Union and Grievant

A hearing in this matter was conducted on 7/29/10 during the course of which the parties presented evidence and arguments in support of their respective positions. Briefs were thereafter filed and the record was closed on 10/2/10. Based upon a review of this record the undersigned renders the following arbitration award.

ISSUE:

Did the Employer violate the Agreement when it denied the Grievant's request to work overtime on the evening of the day he utilized sick leave to take his wife to the doctor, and if so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

Section 2.1 Management Rights

(See pertinent portions in discussion below)

Section 5.5(b)

Scheduled overtime will be posted as early as is practical indicating the necessity for either a patrolman or sergeant based upon the needs of the department. Said overtime shall be filled on a seniority basis within ranks.

BACKGROUND:

The Grievant has been an officer in the Department for 8 years, and President of the Local for more than 4 years.

On or about 12/28/09 he signed up to work an overtime shift of 4 hours beginning at 10:30 p.m. on 1/2/10. This was a scheduled overtime assignment for DUI/seatbelt enforcement.

On 1/2/10 the Grievant called in to take sick leave on his afternoon shift to take his wife to a doctor—an indisputably legitimate use of sick leave. When he called in he advised the Sergeant he talked to why he was taking sick leave.

During said conversation, the overtime assignment came up, and the Sergeant indicated he thought that the Grievant would not be able to work the overtime, and that he would check with a Lieutenant, who, in subsequent conversations with both the Sergeant and the Grievant, confirmed that position. The Grievant was told that the Department's policy was that when an officer used a sick day, the officer could not work for 24 hours. The Grievant was given the option of taking vacation or personal leave so he could work the overtime, and the Grievant declined that offer.

The overtime assignment was worked by another less senior officer.

The Grievant alleged that on two occasions in '09 he utilized either a full or partial sick day, after which, on the same day, he worked overtime. This is undisputed in the record.

The record contains no evidence that any other officer worked overtime on the same day sick leave was utilized. There is also no record evidence that officers or the Union were specifically advised at any time of such a policy, though the Chief, a Lieutenant, and a Sergeant testified that such a policy was in effect, and was, or should have been understood by the Union and the Department's officers. There is also no dispute that when officers use vacation and/or personal days, they cannot be ordered out for a shift for 24 hours. The Employer also does not dispute the Union's allegation that officers have made court appearances, at an overtime rate, even though they have utilized sick leave in the previous 24 hours.

UNION POSITION:

The Grievance should be sustained based, primarily on two considerations. One, the agreement clearly and unambiguously states that overtime shall be filled on a seniority basis within rank. As applied to the instant facts, the Grievant was contractually entitled to the overtime assignment.

Secondly, assuming arguendo that the contractual language is not clear and unambiguous, the record does not support a finding that a past practice existed in the Department supporting the Employer's position. The only practice that arguably existed prevented mandatory call outs for 24 hours after officers utilize authorized leave. And even in that regard, the alleged practice was not clear, as evidenced by the fact that the Sergeant who received the Grievant's call had to call a lieutenant to verify that the Grievant could not work the overtime for which he signed up. There

is also no evidence that the alleged past practice was ever communicated to any officer or the Union. There is simply no agreed upon practice applicable to this case. Indeed, the only evidence in the record refers to the fact that the Grievant worked overtime on days he took sick leave, and that officers made court appearances, at overtime rates, after having taken sick leave.

EMPLOYER POSITION:

The Union has failed to meet its' burden of proof that the Agreement was violated.

Management has retained its ability to schedule, to "determine . . . the personnel by which operations are to be conducted . . .", to "assign . . . set hours of work", and to "determine work schedules . . . daily assignments". Except as restricted by the agreement, the right to schedule work remains in management. (Citation omitted)

The 24-hour sick leave policy was long understood by unit members, supervisors, and the Chief.

In fact, the Chief had a little more flexible interpretation of the policy than his lieutenant and sergeant, particularly where officers take less than a full day of sick leave.

The policy is a legitimate means to prevent sick leave abuse and is a fair method of distributing scheduled overtime. The policy is consistent with management's rights, and is fair, reasonable, and neither arbitrary nor discriminatory.

Furthermore, the Grievant was offered the opportunity to work the overtime if he agreed to change the type of leave he took. However, he refused to do so.

The Union's analogy to court time is also unsupported by fact or evidence.

DISCUSSION:

While it seems evident that the Employer has retained the right to promulgate reasonable rules pertaining to overtime eligibility, so long as said rules do not violate the Agreement's terms (which establishes seniority as the governing factor in making such assignments), the record does not establish by a preponderance of credible evidence that such a rule was in place when the decision to deny the Grievant's request to work overtime was made.

At that time, the record contains no evidence that such a rule was ever communicated to officers or the Union, that it ever existed in any written form, or that it was uniformly applied over a period of time so that it could reasonably be concluded that the officers and Union should have understood that it was in existence—indeed, the only factual evidence in the record indicates that on two

occasions the Grievant was permitted to work overtime on days that he took sick leave.

Furthermore, the record is ambiguous, at best, as to how the alleged rule applies to court appearances at overtime rates on such occasions, and eligibility when sick leave is utilized for family members, particularly when an officer utilizes less than a full day's leave.

For all of these reasons, the undersigned cannot conclude that the Employer's denial of the Grievant's request was supported by a uniformly applied, well-understood eligibility rule or policy. While the Agreement affords the Employer the right to establish reasonable overtime eligibility requirements in the form of rules and policies, the reasonableness of the Employer's action in this instance was lacking in view of the foregoing considerations.

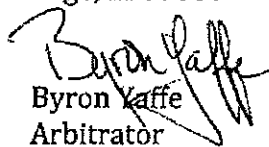
Based upon these considerations, the undersigned will herein grant the Grievant's request for the overtime pay he was denied; however, it should be understood that this award does not prohibit the Employer from prospectively establishing reasonable and legitimate overtime eligibility rules/policies, that are designed to achieve legitimate departmental needs/interests, that are uniformly applied, and that are clearly communicated to affected personnel and the Union.

According, the Undersigned hereby renders the following:

ARBITRATION AWARD

The Employer violated the Agreement when it denied the Grievant's request to work scheduled overtime, on the basis of his seniority, on the evening of a day he utilized sick leave to take his wife to a doctor. The Grievant shall be made whole the losses he incurred resulting therefrom.

Dated this 6th day of October 2010 at Chicago, IL 60660


Byron Yaffe
Arbitrator